STATE OF MICHIGAN

COURT OF APPEALS

ANNA MARIE TAYLOR and DARL TAYLOR,

Plaintiffs-Appellees,

V

RATAN RAJANI, MD and SURGICAL SPECIALISTS, PC,

Defendants-Appellants,

and

LAPEER REGIONAL HOSPITAL,

Defendant.

UNPUBLISHED
October 25, 2005

No. 256058
Lapeer Circuit Court
LC No. 99-027598-NH

Before: Saad, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Defendant Dr. Ratan Rajani performed a right thyroidectomy on plaintiff Anna Marie Taylor to rule out the possibility that a lump in her throat was cancer. Dr. Rajani did not find cancer but after the operation Mrs. Taylor developed hoarseness, vocal weakness and choking. Plaintiffs sued defendants alleging Dr. Rajani committed malpractice by: (1) not providing sufficient information to permit informed consent to the operation, (2) performing a more risky procedure than necessitated by Mrs. Taylor's circumstances, and (3) injuring Taylor's recurrent laryngeal nerve during the surgery, thereby paralyzing her right vocal fold. After a five-day trial, the jury agreed and awarded plaintiffs $150,000. Defendants moved for judgment notwithstanding the verdict, new trial, or remittitur, which the trial court denied. We affirm.

I. Sufficiency of Evidence

Defendant[1] first argues that the trial court erred by not granting his motion for directed verdict at the close of plaintiff's proofs and erred again by denying his motion for judgment notwithstanding the verdict (JNOV). Defendant contends plaintiff's evidence of malpractice was mere speculation, and therefore, insufficient to submit plaintiff's claim to the jury, or to sustain the jury's verdict in plaintiff's favor. We disagree.

We review de novo the trial court's ruling on both motions. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 491; 668 NW2d 402 (2003). With respect to directed verdict, this Court must consider the evidence presented up to the time the motion was made in the light most favorable to the nonmoving party, making all reasonable inferences in the nonmoving party's favor. *Thomas v McGinnis*, 239 Mich App 636, 643-644; 609 NW2d 222 (2000). A directed verdict is proper only when no factual question exists upon which reasonable minds could differ. *Id*. at 644. Similarly, the trial court should grant a JNOV motion only when the evidence and all legitimate inferences viewed in a light most favorable to the nonmoving party fails to establish a claim as a matter of law. *Foreman v Foreman*, 266 Mich App 132, 136; 701 NW2d 167 (2005). We recognize that both the jury and the trial judge have observed the witnesses, and it is the jury that determines the credibility of witnesses and the weight to be accorded the evidence. *Id*. "When the evidence presented could lead reasonable jurors to disagree, the trial court may not substitute its judgment for that of the jury." *Id*.; *Wiley, supra at* 491.

The plaintiff in a medical malpractice case bears the burden of proving: (1) the applicable standard of care, (2) that defendant breached the standard of care, (3) an injury, and (4) proximate cause. *Locke v Pachtman*, 446 Mich 216, 222; 521 NW2d 786 (1994); MCL 600.2912a. A malpractice claim fails when any one of these elements is not established. *Wischmeyer v Schanz*, 449 Mich 469, 484; 536 NW2d 760 (1995). In general, expert testimony is necessary to establish both the applicable standard of care and that the defendant breached the standard. *Woodard v Custer*, 473 Mich 1, 6; 702 NW2d 522 (2005). With respect to the element of proximate cause, the plaintiff must establish not only cause in fact - that it is more probable than not that "but for" the defendant's breach of the standard of care the injury would not have occurred - but also that the defendant's breach was a "legal" cause of the injury. *Craig v Oakwood Hosp*, 471 Mich 67, 86-87; 684 NW2d 296 (2004). Proximate cause is that which, in a natural and continuous sequence, unbroken by any independent, unforeseen cause, produces the injury. *Wiley, supra* at 496. Proximate cause will usually be a question for the trier of fact to decide, but where reasonable minds could not differ, a court may decide the issue as a matter of law. *Babula v Robertson*, 212 Mich App 45, 54; 536 NW2d 834 (1995).

A plaintiff may prove cause in fact by circumstantial evidence, but the proofs must facilitate reasonable inferences of causation, not mere speculation. *Wiley, supra* at 496. A theory of causation that is consistent with known facts but not deducible from them is impermissible conjecture. *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994).

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[1] We use the singular "defendant" to refer to Dr. Ratan Rajani because the liability of Surgical Specialists, PC, is based on agency principles. Likewise, the claim of Darl Taylor is derivative, so we use the singular "plaintiff" to refer to Mrs. Taylor.

To establish cause in fact, a plaintiff must present "substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred." *Id*. at 164-165. This does not mean a plaintiff must negate all other possible causes. Rather, the evidence "must exclude other reasonable hypotheses with a fair amount of certainty" so that the hypothesis on which the plaintiff relies "is more probable than any other hypothesis reflected by the evidence." *Id.* at 166, quoting and concurring with 57A Am Jur 2d, Negligence, § 461, p. 442. See, also, *Craig, supra* at 87-88.

In this case, plaintiff testified that in April 1997 she noticed a lump in her throat. She went to her family physician (Dr. Miller), who referred her to an otolaryngologist (Dr. Hegyi), who referred her to defendant. Plaintiff testified that Dr. Rajani told her she had a nodule that would have to be removed to determine what it was. According to plaintiff, Dr. Rajani did not explain the low risk that the lump was cancer, or the risk of complications from the surgery, including the possibility that her voice might be rendered permanently hoarse, and did not tell her about alternative diagnostic and treatment modalities, in particular, that he did not tell her about the option of having a fine needle aspiration (FNA) biopsy.

Plaintiff had the surgery defendant recommended on June 6, 1997. She testified that after recovering from the operation, her voice was so hoarse she could hardly talk. Before the surgery, her voice was normal, others could understand her when she spoke, she could sleep without problems, and she did not have difficulties with choking or coughing. Plaintiff testified that immediately after surgery, her voice was worse than it was during her testimony at trial. She did not specifically complain about her hoarseness because she believed her condition was obvious to the nurses who attended to her post-operative care. In August 1997, her symptoms had not improved so she sought treatment from Dr. Lawrence Ho, an otolaryngologist.

Dr. Ho diagnosed plaintiff as having right-sided vocal cord paralysis. Dr. Ho opined that plaintiff's condition was most consistent with an injury from the thyroid surgery defendant performed. According to Dr. Ho, an injury to the recurrent laryngeal nerve is an inherent risk of a thyroidectomy, and in his opinion, that is what occurred. Dr. Ho considered the possibility that a dislocated arytenoid[2] caused plaintiff's symptoms but rejected that possibility. After Dr. Ho learned that Dr. James Rontal, another otolaryngologist, believed plaintiff sustained a dislocated arytenoid during her thyroid surgery, Dr. Ho referred plaintiff to yet another otolaryngologist, Dr. Norman Hogikyan. Dr. Ho remained with his opinion that plaintiff's recurrent laryngeal nerve was injured during her thyroid surgery, resulting in persistent right vocal cord paralysis, and associated problems with swallowing, coughing and choking.

Dr. Hogikyan first saw plaintiff on June 19, 2001. He obtained her medical history, performed a physical examination and made a videostroboscopy of plaintiff's throat. Dr. Hogikyan described plaintiff's voice as rough, hoarse, with a gravel-like quality and elevated

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[2] Arytenoids are joint-like cartilage structures on either side of the vocal cords that can be dislocated by direct trauma. Dr. James Rontal opined at trial that plaintiff sustained a dislocated arytenoid when the anesthesiologist inserted a breathing tube down her throat.

pitch. Although plaintiff's voice had normal loudness, she could not hold a steady tone and had breaks in pitch. Dr. Hogikyan opined that plaintiff had a paralyzed vocal fold, not a dislocated arytenoid, and that plaintiff's condition was permanent and surgery would not benefit her.

Plaintiff's general surgery standard of care expert, Dr. Jules Levey, opined that defendant breached the standard of care with regard to each of plaintiff's three malpractice theories. Dr. Levey testified that first, defendant did not obtained informed consent for the thyroidectomy he performed, and second, defendant breached the standard of care by performing surgery before he used the less invasive FNA to obtain a biopsy sample. According to Dr. Levey, plaintiff's history, physical symptoms, including the rapid onset of the lump, and a thyroid scan, all indicated that she had a multi-nodular goiter. Dr. Levey testified only a five percent chance existed that a multi-nodular goiter would be cancer. Further, there was only a five per cent chance an FNA biopsy would miss cancer if it were present and only a ten percent chance that an FNA would gather insufficient information to make a diagnosis. Dr. Levey opined that because all available information indicated plaintiff had a multi-nodular goiter, defendant violated the standard of care by not first performing an FNA biopsy, followed by medication and close observation.

Dr. Levey also testified that plaintiff's medical records provided no evidence that defendant obtained informed consent from plaintiff for the operation. The records did not document defendant advised plaintiff, in layman's language, of the risks and complications of the procedure, nor did the medical records indicate that any other modes of treatment were discussed with plaintiff or recommended instead of surgery. Although defendant denied this, he also testified he would not have been comfortable performing an FNA because he claimed the procedure would miss detecting cancer in one out of three times. According to Dr. Levey, defendant's claimed error rate with an FNA was bogus, and defendant violated the standard of care by not recommending the less invasive FNA as a first diagnostic step.

With respect to plaintiff's third theory of malpractice, Dr. Levey opined that it violated the standard of care to injure plaintiff's recurrent laryngeal nerve during the surgery defendant performed on plaintiff's benign, multi-nodular goiter. Dr. Levey also testified that the statistical chance of injuring the recurrent laryngeal nerve during thyroid surgery in the absence of negligence was only one to two percent, and that in the majority of those cases with unexplained injury, the surgeries were to remove cancerous thyroids. Because plaintiff did not have cancer, Dr. Levey opined defendant negligently injured plaintiff's recurrent laryngeal nerve during surgery, thereby paralyzing her vocal cord. Dr. Levey had not previously heard of dislocated arytenoids, and had never heard of intubation causing a person to be hoarse for years.

On cross-examination, Dr. Levey admitted he could not specify the mechanism of the injury to plaintiff's recurrent laryngeal nerve or where the injury occurred on the nerve without performing further exploratory surgery. He testified that the injury could have occurred in a number of ways. The nerve could have been cut, stretched, transected, or cauterized at any point; moreover, it was irrelevant where along the length of the nerve the injury occurred. Defendant cites the following testimony as the linchpin of his argument that Dr. Levey's opinion was too speculative:

Q. And you're assuming that the nerve was injured because you can't tell us how and you [can't] tell us where?

A. That's correct.

Counsel suggested to Dr. Levey that he could not opine with any degree of medical certainty that defendant injured plaintiff's recurrent laryngeal nerve. Dr. Levey replied:

A. Yes, I can. I think the fact that one to two percent of injury [sic] in the recurrent nerves happen in thyroid surgery, usually malignancy. She wasn't hoarse before the surgery. She was hoarse after. That's the most glaring complication of thyroid surgery because its [sic] right there. They see it. [It's] [r]ight there to hear.

We conclude plaintiff presented sufficient evidence to establish a logical sequence of cause and effect between defendant's conduct and her claimed injury. The testimony of plaintiff's experts, together with her own testimony and that of corroborating lay witnesses when viewed in a light most favorable to plaintiff was sufficient to allow the jury to draw reasonable inferences of a logical, natural, and continuous sequence of events that produced plaintiff's injury. *Skinner, supra* at 164-166. Plaintiff was not required to negate all other possible causes of her injury; she was required to present evidence to exclude "other reasonable hypotheses with a fair amount of certainty" so that her theory of the case "is more probable than any other hypothesis reflected by the evidence." *Skinner, supra* at 166. Because the evidence here was such that reasonable minds could reach different conclusions, the trial court properly declined to decide this case as a matter of law. *Babula, supra* at 45. Accordingly, the trial court did not err in denying defendant's motions for directed verdict and JNOV.

II. Instructions

Defendant next argues that the trial court committed error warranting reversal by instructing the jury that defendant must take plaintiff as he finds her[3] and by instructing the jury on res ipsa loquitur.[4] We disagree.

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[3] The trial court read M Civ JI 50.10: "You are instructed that the defendant takes the plaintiff as he finds her. If you find that the plaintiff was unusually susceptible to injury, that fact will not relieve the defendant from liability for any and all damages resulting to plaintiff as a proximate result of defendant's negligence."

[4] The trial court read M Civ JI 30.05: "If you find that the defendant had control over the body of the plaintiff or instrumentality which caused the plaintiff's injury, and that the plaintiff's injury is of a kind which does not ordinarily occur without someone's negligence, then you may infer that the defendant was negligent. However, you should weigh all of the evidence in this case in determining whether the defendant was negligent and whether that negligence was a proximate cause of plaintiff's injury."

This Court reviews a claim of instructional error de novo. *Ward v Consolidated Rail Corp*, 472 Mich 77, 83; 693 W2d 366 (2005). The trial court should instruct the jury on all material issues, defenses, or theories that are supported by the evidence. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). "Even if somewhat imperfect, instructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury." *Id*. When the issue is fact driven, i.e., whether the evidence supports giving an instruction, we review for an abuse of discretion the trial court's determination whether an instruction is applicable and accurate. *Hilgendorf v St John Hosp & Medical Center Corp*, 245 Mich App 670, 694-695; 630 NW2d 356 (2001); *Stevens v Veenstra*, 226 Mich App 441, 443; 573 NW2d 341 (1997). We will reverse on the basis of instructional error only when the failure to do so would be inconsistent with substantial justice. MCR 2.613(A); *Ward, supra* at 87; *Case, supra* at 6.

First, defendant argues the trial court erred by reading M Civ JI 50.10 because the evidence did not show that plaintiff was unusually susceptible to injury, suggesting that the instruction somehow lowered plaintiff's burden of proof. Plaintiff argues that by questioning some witnesses defendant implied that some of plaintiff's symptoms were caused by a preexisting condition. We conclude that the trial court did not abuse its discretion by reading M Civ JI 50.10. "A tortfeasor takes a victim as the tortfeasor finds the victim and will be held responsible for the full extent of the injury, even though a latent susceptibility of the victim renders the injury far more serious than reasonably could have been anticipated." *Wilkinson v Lee*, 463 Mich 388, 394-395; 617 NW2d 305 (2000). The instruction is, therefore, an accurate statement of the law. We reject defendant's suggestion that accurately informing the jury of the law in this regard somehow lowered plaintiff's burden of proof with respect to establishing the elements of her malpractice case. Accordingly, even if the trial court erred, reversal is not warranted because defendant has not established the instruction unfairly prejudiced him so as to render the jury's verdict inconsistent with substantial justice. MCR 2.613(A).

Second, defendant argues that the trial court erred by instructing the jury on res ipsa loquitur because the doctrine was inapplicable on the facts of this case, and also because plaintiff did not allege the doctrine in her complaint. We disagree.

Res ipsa loquitur is simply a doctrine that permits a plaintiff in certain circumstances to establish a prima facie case of negligence without direct evidence of a negligent act, i.e., to prove a claim of negligence with circumstantial evidence. *Jones v Porretta*, 428 Mich 132, 150; 405 NW2d 863 (1987). "The major purpose of the doctrine of res ipsa loquitur is to create at least an inference of negligence when the plaintiff is unable to prove the actual occurrence of a negligent act." *Id*. The doctrine is not a separate claim of liability. Rather, it is a method proving a claim of negligence. See *Wischmeyer, supra* at 483-484. To invoke the doctrine of res ipsa loquitur, a plaintiff must show: (1) that the event was of a kind which ordinarily does not occur in the absence of negligence; (2) that it was caused by an agency or instrumentality within the exclusive control of the defendant; (3) that it was not due to any voluntary action of the plaintiff; and (4) that evidence of the true explanation of the event was more readily accessible to the defendant than to the plaintiff. *Woodard, supra at* 7, citing *Jones, supra* at 150-151.

Defendant contends plaintiff's evidence was deficient with respect to the first element of res ipsa loquitur. To establish "the fact that the injury complained of does not ordinarily occur in

the absence of negligence must either be supported by expert testimony or must be within the common understanding of the jury." *Locke, supra* at 231. In a medical malpractice case, expert testimony regarding this element of res ipsa loquitur is generally required. *Woodard, supra at* 6. This so because "a prima facie res ipsa [loquitur] medical malpractice case requires more than a showing of [a] bad result." *Jones, supra* at 152. Also, the occurrence of unfortunate complications in medical procedures will generally not be within the common knowledge of the jury. *Woodard, supra at* 7.

Here, plaintiff presented expert testimony that in the absence of negligence an injury would not normally occur to the recurrent laryngeal nerve during diagnostic surgery on a nonmalignant thyroid goiter. Contrary to defendant's argument, Dr. Levy did not admit such an injury could occur in the absence of negligence in up to three percent of thyroid surgeries. Rather, Dr. Levey was impeached with a textbook saying, "Permanent recurrent laryngeal nerve paralysis has been reported in 0 to 3 percent of the cases." Dr. Levey maintained that such injury may occur in only one to two percent of thyroid surgeries, and "the majority of that one to two percent being injured with cancer surgery, not benign thyroid surgery." Further, Dr. Levey opined that it violated the standard of care to injure plaintiff's recurrent laryngeal nerve during the surgery defendant performed on plaintiff. Specifically, Dr Levey testified "[t]he recurrent laryngeal nerve should not have been injured in this surgery." We find Dr. Levey's testimony was sufficient evidence that "but for" negligence this result does not ordinarily occur, and that a reasonable jury could find plaintiff proved it was more likely than not defendant negligently injured her recurrent laryngeal nerve during the surgery. *Jones, supra* at 154-155. Because there was evidence to support it, we conclude that the trial court did not abuse its discretion by reading M Civ JI 30.05 to the jury. *Hilgendorf, supra* at 694-695.

Finally, defendant argues that plaintiff failed to plead res ipsa loquitur in her complaint, and therefore, was not entitled to an instruction on the doctrine. We disagree. Although defendant raised this argument in his motion for new trial, he did not object on this basis at trial. So, this issue has not been preserved for appeal. MCR 2.516(C).[5] Defendant's failure to timely and specifically object precludes our review absent manifest injustice. *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 403; 628 NW2d 86 (2001).

Even if res ipsa loquitur must be specifically pleaded before a plaintiff is entitled to an instruction on the doctrine, and plaintiff's pleadings were deficient in that regard, manifest injustice did not occur here. As discussed already, the testimony of Dr. Levey supported instructing the jury on the doctrine. Moreover, the trial court properly granted plaintiff's post trial motion to amend her complaint to conform to the evidence at trial. MCR 2.118(C)(1); *Zdrojewski v Murphy*, 254 Mich App 50, 56-57, 60-61; 657 NW2d 721 (2002).

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[5] MCR 2.516(C) provides: "A party may assign as error the giving of or the failure to give an instruction only if the party objects on the record before the jury retires to consider the verdict (or, in the case of instructions given after deliberations have begun, before the jury resumes deliberations), stating specifically the matter to which the party objects and the grounds for the objection. Opportunity must be given to make the objection out of the hearing of the jury."

III. Impeachment

Three months before trial, defendant moved the trial court for an order to preclude impeachment of one his expert witness, Dr. John Murphy, with the fact that a malpractice judgment had been entered against him regarding a thyroid surgery he had performed. Plaintiff argued the judgment was relevant to Dr. Murphy's credibility, relying on *Wischmeyer, supra*, which held that in a case alleging surgical malpractice an expert witness may be questioned regarding the expert's own prior poor surgical results. The *Wischmeyer* Court found such an inquiry relevant to the expert's credibility and not unfairly prejudicial. *Id*. at 479-481. But the Court also held that "the mere fact that an expert may have been named in an unrelated medical malpractice action is not probative of his truthfulness under MRE 608 or relevant to his competency or knowledge." *Id*. at 482. Plaintiff, in essence, argued that *Wischmeyer*, and *Persichini v William Beaumont Hosp*, 238 Mich App 626, 632-635; 607 NW2d 100 (1999), were distinguishable because the potential impeachment here involved not just mere allegations of malpractice but a judgment of malpractice that had been affirmed by this Court. See *Zdrojewski, supra.* Defendant contended the impeachment was not relevant but primarily argued to the trial court that the unfair prejudice from the anticipated cross-examination would exceed its probative value. MRE 403. The trial court analyzed the issue by analogizing to impeachment with a prior conviction in a criminal case. Because a prospective witness, not defendant, would be impeached, the trial court ruled that the probative value of the prior malpractice judgment was not substantially outweighed by the danger of unfair prejudice.

In opening statement, defendant conceded plaintiff was injured but suggested that Dr. Rontal would support the defense's theory that plaintiff's symptoms were consistent with dislocated arytenoids as a complication of administering anesthesia. Alternatively, defendant contended that if plaintiff's recurrent laryngeal nerve was injured during the surgery, Dr Murphy would testify that severing the recurrent laryngeal nerve during thyroid surgery "is a recognized complication and it does not mean malpractice occurred."

On the second day of trial, defense counsel renewed defendant's motion in limine to preclude impeaching Dr. Murphy. Defendant argued the prior case in which Dr. Murphy was found negligent was not relevant because it involved a dissimilar thyroid surgery, one in which the patient's thyroid was known to contain cancer. Again, defense counsel argued impeaching Dr. Murphy with the prior malpractice judgment would be too unfairly prejudicial. The trial court noted the prior surgery that resulted in the judgment of malpractice against Dr. Murphy included an injury to the patient's recurrent laryngeal nerve. See *Zdrojewski, supra* at 64. The trial court ruled that there were enough similarities between the surgery in *Zdrojewski* and the instant case to find that the probative value of cross-examining Dr. Murphy regarding the case of malpractice against him would not be substantially outweighed by the danger of unfair prejudice. But, the court ruled that cross-examination would be limited to the fact that there was a malpractice verdict against Dr. Murphy that was affirmed. Defendant chose not to call Dr. Murphy as a witness at trial. Defense counsel told the jury during closing argument this decision was made for "strategic purposes."

On appeal, defendant asserts the trial court's ruling precluded him from calling Dr. Murphy as a witness. According to defendant, his inability to call Dr. Murphy resulted in unspecified prejudice. Plaintiff argues that defendant was aware of the trial court's ruling well in

advance of trial but chose not to seek appellate review or retain a different expert. Rather, defense counsel made a strategic decision not to call Dr. Murphy as a witness because defendant knew that Dr. Murphy's testimony would be more favorable to plaintiff than to defendant. Further, plaintiff argues that defendant did not make a sufficient offer of proof to preserve this issue for appeal.

In ruling on this issue as part of defendant's motion for new trial, the court below agreed with plaintiff's position. The court in denying the motion wrote:

> This court never precluded Dr. Murphy from testifying, or forbade the Defendants to look for another expert witness. On the contrary, this Court was willing to adjourn the trial to give the defendants appropriate time to locate another expert witness in spite of the fact that the Defendants were aware of the Court's ruling in October of 2003. It was Defendants' trial strategy decision to exclude Dr. Murphy's testimony and not replace him.

We review for an abuse of discretion a trial court's decision to admit or exclude evidence. *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001). A trial court abuses its discretion only if an unprejudiced person, considering the facts on which the court acted, would say that there was no justification or excuse for the ruling made, or the result is so palpably and grossly contrary to fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Lewis v LeGrow*, 258 Mich App 175, 200; 670 NW2d 675 (2003). Even if preserved for appeal, evidentiary error will not merit reversal unless a substantial right is involved, and it affirmatively appears that failing to grant relief is inconsistent with substantial justice. *Id*.; MRE 103(a); MCR 2.613(A).

Defendant initially preserved this issue for appeal by moving in limine to preclude the impeachment of Dr. Murphy, and obtaining a ruling from the trial court. Once the trial court has made a definitive ruling on the record admitting or excluding evidence, a party need not renew his objection or offer of proof to preserve the issue for appeal. MRE 103(a)(2). But the trial court's ruling did not preclude defendant from presenting Dr. Murphy as a witness. Rather, defendant decided as a matter of trial strategy to not call him. We hold defendants have thereby waived further review of the trial court's decision on this issue.

In holding that a mere charge of malpractice is not relevant to an expert's credibility, competence, or knowledge, both the *Wischmeyer* Court and the *Persichini* Court cited *Heshelman v Lombardi*, 183 Mich App 72; 454 NW2d 603 (1990). Like the trial court, the *Heshelman* Court analogized this issue to impeachment in a criminal case with prior arrests not resulting in a conviction. "Mere unproven accusations of malpractice stated in a complaint cannot be used as a basis for attacking a physician's knowledge and credibility. Such allegations of malpractice are analogous to unproven charges of criminal activity. Arrests and charges not resulting in conviction may not be used for impeachment." *Id*. at 85 (citation omitted). We find instructive this analogy to impeachment in criminal cases.

In a criminal case, a defendant must testify in order to preserve for review a trial court's ruling permitting impeachment with prior convictions. *People v Finley*, 431 Mich 506, 521 (Riley, C.J.), 531 (Brickley, J.); 431 NW2d 19 (1988), adopting the federal rule announced in

Luce v United States, 469 US 38; 105 S Ct 460; 83 L Ed 2d 443 (1984). "The purpose of the *Luce* rule is to provide a mechanism for meaningful appellate review of the impeachment decision. In fact, the straightforward logic of *Luce* . . . is that as to evidentiary rulings, error does not occur until error occurs; that is, until the evidence is admitted." *Finley, supra* at 512. Most recently, our Supreme Court applied the *Luce* rule to require that a defendant must testify "to preserve for review his challenge to the trial court's ruling in limine allowing the prosecutor to admit evidence of [the] defendant's exercise of his *Miranda* [6] right to remain silent." *People v Boyd*, 470 Mich 363, 365; 682 NW2d 459 (2004).

The *Boyd* Court reviewed the practical reasons for the *Luce* rule. First, appellate review of an evidentiary ruling outside its factual context is inherently difficult, particularly when admissibility turns on weighting the probative value of the evidence against its prejudicial effect. To properly perform this balancing test, a reviewing court must know the precise nature of the testimony, which is unknown unless the defendant testifies. *Boyd, supra* at 368.

Second, the *Luce* rule recognizes "that any possible harm from a trial court's ruling in limine allowing impeachment . . . is wholly speculative in the absence of the defendant's testimony" because during the course of the trial, the court "exercising sound judicial discretion, could modify a previous ruling in limine." *Id*. at 369. Indeed, "without a defendant's testimony, a reviewing court has no way of knowing whether the prosecutor would have sought to introduce the prior conviction for impeachment." *Id*. A prosecutor could determine his case was strong enough without the impeachment, or other means of impeachment are available, or could decide as the trial progresses to not risk using arguably inadmissible prior convictions. *Id*.

"Third, the [*Luce*] Court reasoned that appellate courts cannot assume that an adverse pretrial ruling motivated a defendant's decision not to testify." *Boyd, supra* at 369. "Because an accused's decision whether to testify 'seldom turns on the resolution of one factor,' . . . a reviewing court cannot assume that the adverse ruling motivated a defendant's decision not to testify." *Luce, supra* at 42.

Fourth, requiring the defendant to testify facilitates appellate review of the trial court's ruling for harmless error in the context of the entire case. *Id*.; *Boyd, supra* at 369. Finally, the *Luce* rule discourages litigants from bringing motions in limine "solely to 'plant' error requiring reversal on appeal." *Boyd, supra* at 370.

We believe the practical reasons, for the *Luce* rule, except the first, are equally applicable to a trial court's preliminary ruling on admissibility of impeachment evidence in a civil case. The first reason, not being certain of the witness's testimony, is attenuated in civil cases by the availability and prevalent use of discovery depositions, but, the other reasons for the *Luce* rule apply with equal force to civil cases. For example, this Court cannot know whether the trial court's ruling actually motivated defendant's decision not to call Dr. Murphy as a witness. Defense counsel was aware of the trial court's ruling three months before trial yet told the jury in

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[6] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

his opening statement that Dr. Murphy would testify. Further, defense counsel was able establish the essence of what he told the jury Dr. Murphy would testify about through the testimony of defendant and cross-examination of plaintiff's expert, Dr. Levey. In addition, it is unclear that plaintiff's counsel would have actually impeached Dr. Murphy with the prior malpractice judgment. Plaintiff points to several parts of Dr. Murphy's deposition testimony that were actually more favorable to plaintiff than to defendant, so plaintiff's counsel for that reason may have chosen not to impeach Dr. Murphy. Finally, without Dr. Murphy's actual trial testimony, and even assuming that the trial court abused its discretion in ruling that Dr. Murphy could be impeached with the prior malpractice judgment, it is simply impossible to conduct a meaningful harmless error analysis by weighing the alleged error against the context of the entire case. For these reasons, we conclude that by not presenting Dr. Murphy's testimony at trial defendant has waived appellate review of the trial court's impeachment ruling.

IV. Counsel Misconduct

Next, defendant argues plaintiff's counsel engaged in misconduct warranting reversal by implying defendants had a burden to call expert witnesses to support its position, by falsely indicating to the jury that Dr. Ho and Dr. Hogikyan were not paid by plaintiff's counsel, and by improperly referring to defendant's expert as a "hired gun." We disagree.

We review de novo claims of misconduct by counsel to determine whether a party was denied a fair trial. *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 100; 330 NW2d 638 (1982). We analyze such claims in two steps: (1) did error occur and (2) does it require reversal. *Id*. at 102-103; *Ellsworth v Hotel Corp*, 236 Mich App 185, 191; 600 NW2d 129 (1999). "A lawyer's comments will usually not be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial or where counsel's remarks were such as to deflect the jury's attention from the issues involved and had a controlling influence on the verdict." *Id*. at 191-192. Moreover, a trial court's instruction will be able to cure most but not all misconduct by counsel. *Reetz, supra* at 105-106.

Defendant first argues plaintiff's counsel denied him a fair trial by arguing that defendant did not produce a standard of care expert to testify that Dr. Rajani did nothing wrong in performing surgery on plaintiff. Defendant contends counsel's argument, in essence, improperly and unfairly shifted the burden of proof to defendant. Plaintiff asserts this argument lacks merit because closing argument is intended to permit opposing counsel to highlight the strengths and weaknesses of their respective cases. We agree with plaintiff and find no error here.

Defendant's dual theories of the case were that (1) Dr. Rajani did nothing wrong and (2) plaintiff was injured during the administration of anesthesia. In support of the first theory, defense counsel in opening statement indicated he would call Dr. Murphy as a standard of care expert witness. Further, defendant contended that if he had injured plaintiff's recurrent laryngeal nerve during the surgery, the onset of her symptoms would have been immediate. Defendant also contended plaintiff did not complain of being hoarse after the operation to either attending nurses or Dr. William Zemnickas, Dr. Rajani's partner. Yet, defendant did not produce either Dr. Murphy or Dr. Zemnickas to testify at trial. "[It is legitimate to point out that an opposing party failed to produce evidence that it might have, and consequently the jury may draw an inference against the opposing party. This is permissible even though the same witnesses could

have been produced by both parties." *Reetz, supra* at 109. Moreover, the trial court properly instructed the jury on the burden of proof. Jurors are presumed to follow the trial court's instructions. *Bordeaux v Celotex Corp*, 203 Mich App 158, 164; 511 NW2d 899 (1993). Counsel's argument did not deny defendant a fair trial.

Next, defendant claims plaintiff's counsel committed misconduct by indicating to the jury that counsel did not pay or retain either Dr. Ho or Dr. Hogikyan. Defendant argues that this claim is false, as evidenced by plaintiff's counsel submitting a bill of costs containing fees for both experts. Plaintiff's counsel asserts that his remarks were intended to highlight that both Dr. Ho and Dr. Hogikyan were treating physicians of plaintiff, not experts retained solely for the purpose of rendering an opinion in this litigation. Plaintiff presented the testimony of both doctors through de bene esse video depositions. Each doctor testified that plaintiff's counsel did not refer plaintiff to them or pay for their services to treat plaintiff. The record also indicates plaintiff's bill of costs included expert witness fees only for each doctors' deposition time. We conclude this record does not establish that plaintiff's counsel engaged in a deliberate course of conduct aimed at preventing a fair and impartial trial, or that counsel's remarks deflected the jury's attention from the issues involved, or that counsel's comments had a controlling influence on the verdict. Instead, we find it fair comment to note that neither Dr. Ho nor Dr. Hogikyan was specifically retained for the purpose of this litigation.

Finally, defendant argues plaintiff's counsel denied him a fair trial by referring in his closing argument to Dr. Rontal as a "hired gun." When defense counsel brought this issue to the trial court's attention before commencing his own closing argument, plaintiff's counsel agreed that a curative instruction should be given. The trial court did so before the defense began its closing argument, instructing the jury that the term "hired gun" was inappropriate and should not be used in any way by the jury in deciding the case. We find that counsel's single, brief reference to "hired gun," almost immediately corrected by the trial court's instruction, which we presume the jury followed, *Bordeaux, supra* at 164, cured any possible prejudice the remark may have created, *Reetz, supra* at 106 ("immediate instruction by the court may cure any error").

V. New Trial or Remittitur

Next, defendant argues that the trial court erred by not granting his motion for new trial or remittitur. We disagree. We review for an abuse of discretion the trial court's decision denying defendant's motion for new trial. *Wiley, supra* at 498. "An abuse of discretion occurs when the decision was so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias." *Id*. Here, defendant asserted below the same grounds for a new trial that we have found lacking merit on appeal. Accordingly, we find no abuse of discretion on the part of the trial court in denying defendant's motion for new trial.

Last, defendant argues that the evidence at trial does not support the jury's verdict of $150,000, and that it was the duty of the trial court to grant his motion for remittitur. In support of this argument, defendant points to evidence that contradicted plaintiff's claim that her voice had been rendered permanently hoarse. Plaintiff contends the jury's verdict was supported by the evidence, and therefore, was not excessive. When damages awarded by a jury are excessive, a court may grant a new trial, or offer the prevailing party an opportunity to consent to judgment in the highest amount supported by the evidence. MCR 2.611(A)(1)(c)-(d), (E)(1). Here, the

trial court denied defendant's motion for remittitur because "the verdict was within the range of the testimony and not excessive." The trial court also found it ironic that a case evaluation panel had awarded plaintiffs the same amount as the jury.

We cannot substitute our judgment for that of the trial court regarding remittitur unless we find that the trial court abused its discretion. *Palenkas v Beaumont Hospital*, 432 Mich 527, 531; 443 NW2d 354 (1989). "The trial court, having witnessed all the testimony and evidence as well as having had the unique opportunity to evaluate the jury's reaction to the proofs and to the individual witnesses, is in the best position to make an informed decision regarding the excessiveness of the verdict." *Id*. We must review the trial court's decision by considering the evidence in the light most favorable to the nonmoving party. *Phillips v Deihm*, 213 Mich App 389, 405; 541 NW2d 566 (1995). Moreover, the adequacy of the amount of the damages is generally a matter for the jury to decide. *Kelly v Builders Square, Inc*, 465 Mich 29, 34-35; 632 NW2d 912 (2001).

Here, defendant argues the same conflicts in the evidence that the jury resolved in plaintiff's favor. The trial court also viewed the evidence and found that it supported the jury's verdict. With the deference we must accord to the jury and the trial court, we cannot find an abuse of discretion on the part of the trial court in denying defendant's motion for remittitur.

We affirm.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Jane E. Markey